

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JORGE DOMINGUEZ

Claimant

V.

E & J TRANSPORT

Respondent

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Docket No. 1,071,364

ORDER

Respondent, through Kerry McQueen, of Liberal, requests review of Administrative Law Judge Pamela J. Fuller's April 7, 2015 preliminary hearing Order. Paul V. Dugan, Jr., of Wichita, appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the February 17, 2015 deposition transcript of Geyla Varela, the April 6, 2015 preliminary hearing transcript, and all pleadings contained in the administrative file.

ISSUES

The judge determined respondent's annual gross payroll was more than \$20,000 in 2013 and 2014, such that respondent was subject to the Kansas Workers Compensation Act (Act). Respondent was ordered to provide medical treatment.

Respondent requests the Order be reversed, arguing there was insufficient evidence to support a finding that respondent had the requisite total gross annual payroll for 2013 and 2014, such that the judge lacked jurisdiction to impose an order. Claimant maintains the Order should be affirmed.

The sole issue is whether respondent is subject to the Act based on its 2013 and 2014 payrolls?

FINDINGS OF FACT

Respondent, a common carrier in Kansas, hauled loads of grain or manure or brokered loads to other truck owners. Claimant testified he started working for respondent in July 2014. He loaded, drove and unloaded trucks. Each work day, claimant would meet his boss, Martin Ruiz, at a gas station to be transported to one of two job sites. Claimant testified there were four employees besides the boss, and the business owned four trucks which all displayed a company logo. Claimant testified he worked every day except Sundays as long as it did not rain. Claimant testified he was paid \$300 a week, which was a percentage of each load he hauled.

On August 12, 2014, claimant was driving a truck for respondent. Another semi-tractor failed to yield at an intersection and struck the side of claimant's truck, resulting in a total loss. Claimant had injuries to his face, legs and back.¹ Following the accident, he called Mr. Ruiz who arrived at the scene and transported him to St. Catherine Hospital for treatment. Claimant requested medical treatment for continuing back and leg pain.

Geyla Varela, respondent's sole owner who conducts business as E & J Transport, testified by deposition and at the preliminary hearing. Ms. Varela testified respondent uses employees and independent contractors to haul loads. Ms. Varela testified respondent had two trucks in 2013 and 2014, but one truck was not working for part of 2014. Ms. Varela testified respondent had four employees in 2014, including one or two drivers, and Martin Esparza, a dispatcher and a mechanic who has worked for respondent from its inception. Ms. Varela testified claimant worked two days before his accident and the company could never contact him to do work. When Ms. Varela receives payment for a job, employees and independent contractors are paid the same percentage, depending on what was hauled, with no money being taken out for taxes. Respondent tells employees and independent contractors where and when to start a job and where to make a pick-up or a delivery. Ms. Varela testified respondent did not perform any work from September through December and "another month"² in 2014 and the same would be true in 2013.

Ms. Varela testified no work was performed after claimant's accident. Ms. Varela stated that as a result of the accident, she found out that she was not complying with Internal Revenue Service rules and regulations concerning wage reporting. She noticed "stuff was not accurate"³ with driver qualification files and whether respondent should have been using W-2 forms instead of treating everything like contract labor. Respondent/Ms. Varela was disciplined by the Kansas Corporation Commission.⁴ Ms. Varela testified she never knew using a W-2 versus a Form 1099 was "supposed to be different. . . ."⁵ Subsequent to the accident, she has been working with an accounting firm to correct her deficiencies by filing or preparing to file amended tax returns.

¹ Claimant also testified he lost his drivers license following this incident for reasons not fully explained in the record, perhaps because the truck did not have proper insurance or plates. Claimant testified his boss, Martin Ruiz, called his wife (who is not identified in the record) and told her to put insurance on the truck because it had been wrecked. (P.H. Trans. at 11). Respondent's truck was insured not in respondent's name or Ms. Varela's name, but in the name of Jose Miguel Ruiz commencing August 12, 2014. (Varela Depo., Ex. 2). The identity, role or involvement of Jose Miguel Ruiz, and whether he is part of Ms. Varela's family, is not explained in the record.

² Varela Depo. at 27.

³ *Id.* at 37.

⁴ Details of such discipline are not part of the evidentiary record.

⁵ P.H. Trans. at 19.

Claimant issued subpoenas for Ms. Varela to produce respondent's payroll records and tax forms, among other items.⁶ Some pages of Ms. Varela's federal taxes were placed in evidence. Such records show respondent paid \$118,669 for contract labor in 2011, \$113,425 for contract labor in 2012 and \$103,176 for contract labor in 2013, and withheld no taxes and paid no wages to any employees. Ms. Varela testified amounts paid as contract labor included wages paid to employees; i.e., some money paid as contract labor should have been listed as wages paid to employees. She has not completed her 2014 taxes after receiving a filing extension.

Ms. Varela testified her check register and canceled checks showed she did not pay more than \$20,000 in wages to anyone who is not a member of her family by marriage or by blood relation in 2012, 2013 or 2014. Ms. Varela presented some evidence of what respondent paid to employees and independent contractors. For 2013, respondent paid \$19,515.20 in payroll to 13 individuals. Of that, \$7,847.41 was paid to four people: two people identified as Ms. Varela's cousins (one of whom is Omar Garcia), a brother-in-law, and an uncle (Luis Garcia).⁷ No check numbers or dates of payments were listed. Ms. Varela also produced four Form 1099s showing total payments of \$83,660.81 to non-employees in 2013. Adding together employee pay and contractor pay equals total pay of \$103,176.01, just one penny off the total figure for contract labor in Ms. Varela's 2013 tax records.

For 2014, according to Ms. Varela, not including contract labor, respondent paid \$20,783.08 for payroll in 2014.⁸ Of that amount, \$4,961.75 was listed as being paid to one of Ms. Varela's cousins and her uncle. Check numbers were listed in no particular order, but dates of payment are not included and some payees do not have a listed surname.

The judge concluded:

Claimant's Exhibit No. 1 to the Preliminary Hearing Transcript shows what the respondent claims to be payroll for 2014 which would be through August 12, 2014. Mrs. Varela testified no work was performed after the date of accident. The exhibit does not contain any dates of payment and no last names for some receiving payments. Also, it lists check numbers that are in no particular order. It shows a gross payroll of \$19,044.08 less \$4,961.75 to family. K.S.A. 44-505(a)(2) states that the act does not apply to an employer wherein the employer had a total gross

⁶ The record does not delineate what records, if any, respondent may have provided claimant in response to the subpoenas or if claimant requested bank records, such as copies of checks respondent may have written to pay employees.

⁷ Luis Garcia may actually be claimant's great uncle. Ms. Varela's testimony is confusing: "His mom and my dad's dad are brothers" and "My dad's dad and his mom are brothers." (Varela Depo. at 31). Setting aside the impossibility of a man and woman being brothers, Omar is Luis' son.

⁸ This figure includes handwritten payments listed in the deposition exhibit.

annual payroll for the preceding calendar year of not more than \$20,000.00 for all employees and wherein the employer reasonably estimates that they will not have a total gross annual payroll for the current year of more than \$20,000.00. Further, that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll. K.S.A. 44-508(c) defines members of a family. Cousins and uncles are not included, therefore all the excluded payroll should be counted. If the respondent had continued with the business, they could have reasonably estimated that the payroll would exceed \$20,000.00. For the preceding calendar year, 2013, the respondent has filed an amended return, (Respondent's Exhibit 1), where copies of 1099 Forms were attached showings contract labor in excess of \$100,000. No copies of W-2 forms were provided, only a sheet attached showing payroll of \$19,515.20. It does not contain dates of payments or even check numbers. Not all of the pages of the return were provided. The page that should be signed and dated was not provided.

Based on the evidence provided, it is found that the respondent should be subject to the Workers's Compensation Act. The testimony and evidence provided do not convince this court that the respondent's annual gross payroll was less than \$20,000.00 in 2013 or 2014. The claimant's request for medical treatment should be and the same is hereby granted and ordered to be provided and paid for by the respondent.

The claimant failed to prove that he was temporarily totally disabled for any period of time, therefore, his request for temporary total disability compensation should be and the same is hereby denied.⁹

Thereafter, respondent filed a timely appeal.

PRINCIPLES OF LAW

The claimant has the burden to prove coverage under the Act under K.S.A. 44-505(a)(2).¹⁰ The trier of fact shall consider the whole record.¹¹

K.S.A. 44-505 states, in part:

(a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

...

⁹ ALJ Order (Apr. 7, 2015) at 3.

¹⁰ *Slusher v. Wonderful House Chinese Rest., Inc.*, 42 Kan. App. 2d 831, 833, 217 P.3d 11 (2009).

¹¹ K.S.A. 2014 Supp. 44-501b(c).

(2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection[.]

K.S.A. 2014 Supp. 44-508 states, in part:

(c)(2) "Members of a family" means only surviving legal spouse and children; or if no surviving legal spouse or children, then parents or grandparents; or if no parents or grandparents, then grandchildren; or if no grandchildren, then brothers and sisters. In the meaning of this section, parents include stepparents, children include stepchildren, grandchildren include stepgrandchildren, brothers and sisters include stepbrothers and stepsisters, and children and parents include that relation by legal adoption. In the meaning of this section, a surviving spouse shall not be regarded as a dependent of a deceased employee or as a member of the family, if the surviving spouse shall have for more than six months willfully or voluntarily deserted or abandoned the employee prior to the date of the employee's death.

ANALYSIS

This Board Member affirms the result of the preliminary hearing Order. It appears the judge did not believe Ms. Varela's testimony. Like the judge, this Board Member is convinced respondent's payroll exceeded \$20,000 in 2013 and would reasonably have been estimated to exceed \$20,000 in 2014. Respondent only stopped operations in 2014 because of claimant's accident and problems unearthed as a result. Contrary to Ms. Varela's testimony, it is unreasonable to conclude a trucking firm would stop operating in September of any given year.

Claimant has the burden to prove that respondent exceeded the \$20,000 threshold. In attempting to carry out such burden, claimant subpoenaed respondent's business records and took Ms. Varela's deposition. While the record does not contain absolute documentary proof that respondent's payroll exceeded \$20,000 (such as copies of checks to employees), claimant nonetheless prevails based on circumstantial evidence. As noted by the judge, respondent's payroll documentation for both 2013 and 2014 is lacking, consisting largely of one page for each year. Tax records show no wages. The 2013 payroll sheet lists payees and amounts, but no check numbers or dates of payments. The 2014 payroll sheet randomly lists check numbers and payees, but not dates of payments.

Conspicuously absent from the record is documentation of wages paid to Martin Ruiz, claimant's boss, or Martin Esparza, a dispatcher and mechanic who has been employed by respondent since it started operations. The only so-called family members listed in the one page documents for the 2013 and 2014 payrolls are what Ms. Varela terms her cousins, a brother-in-law and her uncle. Therefore, it appears neither Mr. Ruiz or Mr. Esparza are her family members¹² and respondent's accounting of its payroll records is under-reported. Even if the Board were to consider claimant's uncle (or great uncle) or cousin (or second cousin) or the other cousin not part of the 2013 and 2014 payroll, respondent would only need one minimum wage worker to work slightly more than 22 hours per week in 2013 and 11 hours per week in 2014 to exceed the \$20,000 threshold. It is difficult to believe Mr. Ruiz or Mr. Esparza would work so cheaply for respondent such that it would not need to carry workers compensation insurance.

Another consideration is whether claimant's great uncle and his son are members of Ms. Varela's family. The judge concluded they were not. The Act defines family members in K.S.A. 2014 Supp. 44-508(c)(2). Claimant contends the statute applies to determine family members of an employer; respondent asserts the statute only applies to sort out what family members get benefits following a worker's death.

In *Hall*, the Kansas Court of Appeals stated:

In reviewing the definitions section of the KWCA, we also note that K.S.A. 2011 Supp. 44-508(c)(2) defines the phrase "[m]embers of a family" to mean a "legal spouse and children [including a birth child or an adopted child], ... parents or grandparents, . . . grandchildren, or . . . brothers and sisters." We find this definition to be consistent with the language used by the legislature in K.S.A. 44-505(a)(2) because both statutes refer to natural persons – not artificial legal entities – as members of a family. Thus, we conclude that the family member exclusion set forth in K.S.A. 44-505(a)(2) only applies to natural persons and is not applicable to artificial entities such as corporations because they are separate legal entities distinct from those who own shares in the corporation.¹³

Hall does not necessarily rule out a more extended or inclusive family for the purpose of a family-owned business. Rather, *Hall* noted both statutes refer to natural persons as family members. *Hall* does not hold that "members of a family," for purposes of K.S.A. 44-505(a)(2) is the same as that for determining "members of a family" when determining who gets death benefits when a worker dies in a compensable accident. In any event, given the conclusion that respondent exceeded the \$20,000 payroll in 2013 and 2014 irrespective of payroll respondent wants excluded as being to family members, this Board Member need not address this issue.

¹² Claimant's 2011 tax records identify two sons with the surname Esparza, but claimant's filing status was single. There is no proof Mr. Esparza is part of Ms. Varela's family by marriage or consanguinity.

¹³ *Hall v. Knoll Bldg. Maint., Inc.*, 48 Kan. App. 2d 145, 153, 285 P.3d 383 (2012).

Finally, it appears respondent is simply “farming out” the very work it contracted to perform to what it characterizes as independent contractors. This Board Member has not included contractor pay in determining respondent’s payroll, but whether these contractors are indeed independent from respondent and not employees is suspect, especially considering that respondent treats employees and contractors the same in terms of telling them what to do and how they are paid. Much like respondent waited until after claimant’s accident to insure the wrecked truck, it appears respondent is trying to avoid the expense of workers compensation insurance by delegating its very work to what it terms independent contractors.

CONCLUSION

Even if excluding wages paid to Ms. Varela’s relatives, this Board Member concludes respondent’s payroll exceeded \$20,000 in 2013 and would reasonably have been expected to exceed \$20,000 in 2014.

WHEREFORE, the Board affirms the result of the April 7, 2015 Order.

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

BOARD MEMBER

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Honorable Pamela J. Fuller